SOH KENG HIAN

v.

AMERICAN INTERNATIONAL ASSURANCE CO. LTD.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATO' MAHADEV SHANKAR JCA
[CIVIL APPEAL NO. J-02-201-1994]
16 JANUARY 1996

CIVIL PROCEDURE: *Notice of appeal - Service - Notice not served on respondent - Whether fatal - Whether appeal rendered incompetent - Extension of time to serve - Delay - Mistake of solicitor's clerk - Whether a proper excuse - Rules of the Court of Appeal 1994.*

This appeal involved two cross motions, namely, an application by the respondent to strike out the appeal for want of service of the notice of appeal and an application by the appellant for extension of time to serve the notice of appeal on the respondent. The facts were that on 1 October 1994, the appellant filed an appeal in the Muar High Court Registry against the decision of the learned Judge given on 3 September 1994, in respect of a suit between them. The filing of the appeal was within the time allocated by the relevant Rules, but the notice of appeal, however, was not served on the respondent. The state of non-service continued for about two months after the expiry of the date for such service, which was 4 October 1994. On 13 December 1994, the respondent filed their motion aforesaid and applied to strike out the appeal. The appellant did not immediately respond, and it was not until 13 January 1995, i.e about a month later, that the appellant applied to have time for service of the notice of appeal extended.

Before the learned appeal Judges, the appellant sought to justify the failure to serve on the confusion that resulted from the transfer of the trial Judge from Muar to Kuala Lumpur. As to the delay in filing the application for extension of time, apparently, the reason advanced was that it was due to the mistake of his solicitor or the solicitor's clerk.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] An appeal to this Court is brought by filing **and** serving the notice of appeal. The one act without the other renders the appeal incompetent. While it is true that this Court is seised with a wide discretion to extend time in proper and deserving cases it is not an unprincipled discretion.

[2] The appellant's reasons for not serving the notice of appeal within time are wholly unconvincing. This Court is unable to see what the transfer of the Judge from Muar to Kuala Lumpur has to do with the duty of the appellant to serve the notice of appeal on the respondent.

[3] There is not a word in the appellant's affidavit explaining the delay in filing for an extension of time. Surely, there was nothing in the way of the appellant making such an application timeously to this Court. As matters stand the application was not filed until a month after the respondent had taken steps to have the appeal dismissed.

[4] While it is true that in an application of this nature, made as it was under the Rules of the Court of Appeal 1994, the mistake of a solicitor or his clerk could be an valid excuse, and so, may be taken into consideration when deciding whether to grant an extension of time or not, even after taking this factor into account, and the other relevant circumstances obtaining, this Court is still unable to exercise discretion in favour of the appellant.

[Appellant's application refused. Respondent's application granted]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Notis rayuan - Penyampaian - Notis tidak disampaikan ke atas responden - Samada memudaratkan - Samada rayuan dianggap tidak kompeten - Lanjutan masa untuk menyampaikan - Kelewatan - Kesilapan kerani peguamcara - Samada merupakan kesilapan yang boleh dimaafkan - Kaedah-kaedah Mahkamah Rayuan 1994.*

Rayuan ini melibatkan dua usul bersilang, iaitu satu permohonan oleh responden untuk membatalkan rayuan kerana ketiadaan penyampaian notis rayuan dan satu permohonan oleh perayu untuk lanjutan masa bagi menyampaikan notis rayuan ke atas responden. Fakta-faktanya adalah bahawa pada 1 Oktober 1994, perayu telah memfailkan satu rayuan di Pejabat Pendaftaran Mahkamah Tinggi Muar terhadap keputusan Hakim yang bijaksana yang telah diberikan pada 3 September 1994 berhubung dengan satu guaman antara mereka. Pemfailan rayuan tersebut telah dilakukan dalam tempoh yang telah diperuntukkan oleh kaedah-kaedah yang relevan, tetapi notis rayuan tersebut, bagaimanapun, telah tidak disampaikan ke atas responden. Keadaan ketidak-sampaian ini berlanjutan selama lebih kurang dua bulan selepas luputnya tarikh penyampaian yang sedemikian, yang mana adalah 4 Oktober 1994. Pada 13 Disember 1994, responden telah memfailkan usul mereka seperti yang tersebut di atas dan memohon untuk membatalkan rayuan tersebut. Perayu telah tidak memberikan jawapan yang segera, dan hanya sehingga 13 Januari 1995, iaitu lebihkurang satu bulan kemudiannya, perayu memohon untuk mendapatkan lanjutan masa bagi penyampaian notis rayuan tersebut.

Di hadapan Hakim-Hakim rayuan yang bijaksana, perayu telah memberi alasan bahawa kegagalan penyampaian diatas adalah berpunca dari kekeliruan yang diakibatkan oleh perpindahan Hakim perbicaraan daripada Muar ke Kuala Lumpur. Berhubung dengan kelewatan memfailkan permohonan untuk lanjutan masa, alasan yang diberikan adalah bahawa ianya disebabkan kesilapan peguamcaranya atau kerani peguamcara tersebut.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Rayuan kepada Mahkamah ini dimulakan dengan memfailkan **dan** menyampaikan notis rayuan. Sesuatu tindakan tanpa yang lain menjadikan rayuan tersebut tak kompeten. Walaupun ianya benar bahawa Mahkamah ini mempunyai bidangkuasa yang luas untuk melanjutkan masa bagi kes-kes yang wajar dan layak, budibicara berkenaan merupakan budibicara yang tidak berprinsip.

[2] Alasan-alasan perayu kerana tidak menyampaikan notis rayuan dalam tempohnya adalah sesungguhnya tidak menyakinkan. Mahkamah ini tidak dapat melihat apakah perkaitannya pemindahan Hakim tersebut daripada Muar ke Kuala Lumpur dengan kewajipan perayu untuk menyampaikan notis rayuan ke atas responden.

[3] Tidak terdapat satu perkataan pun dalam afidavit perayu yang menjelaskan mengenai kelewatan dalam pemfailan untuk mendapatkan lanjutan masa. Adalah jelas bahawa, tidak terdapat apa-apa yang menghalang perayu daripada membuat permohonan yang menurut masanya kepada Mahkamah ini. Sepertimana yang berlaku, permohonan ini telah tidak difailkan sehingga satu bulan selepas responden mengambil langkah-langkah untuk memohon penolakan rayuan tersebut.

[4] Sementara ianya benar bahawa dalam sesuatu permohonan yang bersifat seperti ini, yang telah dibuat di bawah Kaedah-kaedah Mahkamah Rayuan 1994, kesilapan seseorang peguamcara atau keraninya boleh dikatakan merupakan alasan yang sah, dan yang sedemikian, boleh diambil kira ketika memutuskan samada hendak memberikan lanjutan masa atau pun tidak, walaupun selepas mengambilkira faktor ini dan keadaan-keadaan relevan lain yang diperolehi, Mahkamah ini masih tidak dapat melaksanakan budibicara yang memihak kepada perayu.

[Permohonan perayu ditolak. Permohonan responden dibenarkan]

Cases referred to:
Setali Development Sdn. Bhd. v. Lim You Keng [1984] 1 MLJ 26 ***(refd)***
Gurbachan Singh v. Seagrott & Campbell (No. 2) [1962] MLJ 370 ***(foll)***
Re Coles & Ravenshear [1907] 1 KB 1 ***(refd)***
Sinnathamby & Anor. v. Lee Chooi Ying [1987] 1 MLJ 110 ***(refd)***

For the appellant - Lim Huck Beng; M/s. H.B. Lim, Farha & Lim
For the respondent - Robert Lai; M/s. Jackson & Masacorale

JUDGMENT

Gopal Sri Ram JCA:

There are two motions in this appeal. The first is an application dated 13 December 1994, by the respondent to strike out the appeal for want of service of the notice of appeal on it: the second is dated 13 January 1995, and was taken out by the appellant for extension of time to serve the notice of appeal on the respondent.

The relevant chronology is not in dispute. The High Court at Muar delivered its decision in the suit between the parties on 3 September 1994. The appellant was dissatisfied with the decision. He wished to challenge the decision of the High Court. So, on 1 October 1994, he filed an appeal in the Registry of the High Court. That was within the time limited by the Rules of the Court of Appeal, 1994. But he overlooked serving it on the respondent. The last date for doing this was 4 October 1994, and not 3 October 1994, as contended by the respondent in its affidavit. See, *Setali Development Sdn. Bhd. v. Lim You Keng* [1984] 1 MLJ 26.

On 10 October 1995, the respondent received a copy of a letter from the appellant's solicitors addressed to the Deputy Registrar of the High Court at Muar enclosing the requisite number of copies of the notice of appeal for filing. This was the first time the respondent became aware of the appellant's intention to appeal. The respondent's solicitors waited for more than two months to be served with the notice of appeal. They were not. On 13 December 1994, they filed a motion to strike out the appeal. Even this did not stir the appellant into any form of activity. He continued to do nothing for another month. It was only on 13 January 1995, that is to say, some three days before the respondent's motion was scheduled to be heard that the appellant put in his application to have time extended for service of the notice of appeal.

The appellant's reasons for not serving the notice of appeal on the respondent within time are wholly unconvincing. He says that there was some confusion resulting from the transfer of the Judge from Muar to Kuala Lumpur. We are quite unable to see what all this has to do with the duty of the appellant to serve the notice of appeal on the respondent. Further, there is not a word in the appellant's affidavit explaining the delay in filing its application for an extension of time. Surely, there was nothing in the way of the appellant making such an application timeously to this Court. As matters stand, the application was not filed until a month after the respondent had taken steps to have the appeal dismissed.

We do not intend to dwell upon the rules of Court. This much is clear. An appeal is brought to this Court by filing **and** serving the notice of appeal. The one act without the other renders the appeal incompetent. There are scores of authorities on the point commencing from *Gurbachan Singh v. Seagrott & Campbell (No. 2)* [1962] MLJ 370.

It is axiomatic that this Court is seised of a wide discretion to extend time in proper and deserving cases. But it is not an unprincipled discretion. There must be some relevant evidential material made available to us before we may exercise discretion.

Further, we are fully conscious of the difference between the language of the Federal Court (Civil Appeals) (Transitional) Rules, 1963 and the Rules of the Court of Appeal, 1994. The former required an appellant to obtain special leave to extend time to either file or to serve a notice of appeal. The latter has no such requirement. This difference in language has an important consequence. Whereas in an application under the former, the mistake of a solicitor or his clerk was no excuse (*Re Coles & Ravenshear* [1907] 1 KB 1), it is a factor which the Court may now take into account when deciding whether to grant an extension of time under the latter (*Sinnathamby & Anno v. Lee Chooi Ying* [1987] 1 MLJ 110).

In the present case there was, as we have earlier observed, no reasonable explanation for the failure to serve and the delay in approaching this Court. We took into account all that could be said in favour of the appellant and weighed it against all the other circumstances of the case. Having done this, and having considered all the relevant circumstances, we found ourselves unable to exercise discretion in the appellant's favour.

In the exercise of our discretion, we refused the appellant's application and granted that of the respondent. Costs of both applications were awarded to the respondent. Consequently, the appeal was dismissed with costs and the deposit was ordered to the paid to the respondent to account of its taxed costs.

Reported by W.A. Sharif